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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 12—Original.

STATE OF NEW JERSEY, *Plaintiff,* vs. CITY OF NEW YORK, *Defendant.*	*In Equity.* *Application for Further Relief at the Foot of the Decree.*

Notice.

To: Hon. Arthur J. W. Hilly, Corporation Counsel, Solicitor of Defendant.

Dear Sir:

Please be advised that on Monday, May 8, 1933, plaintiff will apply to the court for leave to file the annexed petition and supporting brief.

Yours respectfully,

WILLIAM A. STEVENS,
Attorney-General,

DUANE E. MINARD,
Assistant Attorney-General,
Solicitors for Plaintiff-Petitioner.

May 1, 1933.

Motion.

In The

SUPREME COURT OF THE UNITED STATES.

October Term, 1931.

No. 13—Original.

STATE OF NEW JERSEY, *Plaintiff,* vs. CITY OF NEW YORK, *Defendant.*	*In Equity. Application for Further Relief at the Foot of the Decree.*

Motion for Leave to File Petition.

Comes Now the State of New Jersey, by its Attorney-General, and asks leave of the court to file the annexed petition.

WILLIAM A. STEVENS,
Attorney-General,
DUANE E. MINARD,
Assistant Attorney-General,
Solicitors for Plaintiff-Petitioner.

May 8, 1933.

Statement.

Statement.

The purpose of this petition is to secure relief to plaintiff against defendant's failure to make provision for compliance with the decree of this court, entered December 7, 1931, requiring the discontinuance of dumping of defendant's garbage at sea on and after June 1, 1933.

WILLIAM A. STEVENS,
Attorney-General,

DUANE E. MINARD,
Assistant Attorney-General,
Solicitors for Plaintiff-Petitioner.

May 8, 1933.

Proof of Service.

In The

SUPREME COURT OF THE UNITED STATES.

October Term, 1931.

No. 13—Original.

STATE OF NEW JERSEY, *Plaintiff,* *vs.* CITY OF NEW YORK, *Defendant.*	*In Equity.* *Application for Further Relief at the Foot of the Decree.*

Proof of Service of Motion, Petition and Supporting Brief.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

VERA E. CASTELLANO, of full age, being duly sworn, according to law, on her oath deposes and says:

On May 1, 1933, at the Post Office, in the City of Newark, New Jersey, I deposited, in sealed envelopes, with first-class postage thereon by registered mail prepaid, a true printed copy of the annexed motion, petition, and supporting brief, addressed to Hon. Arthur J. W. Hilly, Corporation Counsel, of the City of New York, as solicitor for defendant, at his office in the Municipal Building, Borough of Manhattan, City, County and State of New York.

VERA E. CASTELLANO.

Sworn and subscribed before me
this 1st day of May, 1933.

JOHN J. GAFFEY,
Attorney at Law of New Jersey.

Petition.

In The

SUPREME COURT OF THE UNITED STATES.

October Term, 1931.

No. 13—Original.

STATE OF NEW JERSEY, *Plaintiff,* vs. CITY OF NEW YORK, *Defendant.*	*Application for Further Relief at the Foot of the Decree.*

Petition of Plaintiff—State of New Jersey.

Petitioner respectfully shows:

1. This is an original action instituted by complaint filed May 13, 1929, praying for a writ of injunction to restrain defendant from dumping garbage and refuse, or other noxious, offensive or injurious matter, into the ocean off the coast of New Jersey, and from otherwise defiling or polluting the waters and beaches of plaintiff.

2. After issue joined, the case was referred, on October 14, 1929, to Honorable Edward K. Campbell, Special Master, to take testimony, and to submit findings of fact, conclusions of law, and his recommendations for a decree.

3. Hearings were held and the case was submitted on oral argument and briefs before the Special Master, who filed his report March 20, 1931, submitting his conclusion that plaintiff was entitled to relief in accordance with the prayer of the bill, and recommending a decree accordingly.

Petition.

4. The Special Master also concluded and recommended that defendant should be given a reasonable time within which to put in operation sufficient incinerators to care for its garbage and rubbish.

5. The case was argued before the court on April 30, 1931, on defendant's exceptions to the report of the Special Master, and, by opinion delivered by Mr. Justice Butler on May 18, 1931 (*283 U. S. 473*), the court approved the Special Master's conclusions and recommendations and directed a decree for injunction to be entered in accordance with the prayer of the complaint, but it directed that before injunction was issued a reasonable time should be accorded to defendant to enable it to carry into effect its proposed plan for the erection and operation of incinerators to destroy the materials now dumped at sea, or to provide other means to be approved by the decree for the disposal of such materials. The case was referred back to the Special Master to ascertain what length of time would be reasonably necessary for that purpose, and to report his findings and a form of decree.

6. After hearings and argument on the re-reference, the Special Master filed his report on November 30, 1931, expressing the conclusion that four additional incinerators, with a rated daily capacity of 750 tons each, which defendant planned to construct, were necessary and that they should be ready for operation on or before June 1, 1933, and that until that date was a reasonable time to be allowed to enable defendant to otherwise finally dispose of its garbage and materials now dumped at sea.

7. A form of decree was consented to by the parties, and adopted and entered by the court on December 7, 1931 (*284 U. S. 585*), enjoining defendant, on and after

Petition.

June 1, 1933, in accordance with the prayer of the complaint, and directing defendant to file with the court, on the first days of April and October of each year, beginning April 1, 1932, a report setting forth the progress made in the construction of incinerator plants for the final disposition of garbage and refuse.

8. Said decree provides that either party may apply to the court, on due notice to the other party, with respect to the progress of construction of the proposed incinerator plants or other means of final disposition of garbage and refuse, as may be deemed to be appropriate.

9. Said decree also provides that either party may, irrespective of the filing of the periodical reports, apply at the foot of the decree for any other or further action or relief, and the court retained jurisdiction for the purpose of any order or direction, or any supplemental decree, which it may deem proper in relation to the subject matter in controversy.

10. Pursuant to said decree defendant filed reports as of April 1 and October 1, 1932, and April 1, 1933. The last report, which was presented to the court on April 10, 1933, states that on March 22, 1933 the work of actual construction of two incinerator plants, each of a daily capacity of 750 tons, was commenced.

11. The actual construction of incinerators of the type and capacity recommended by the Special Master and proposed by defendant requires from ten to twelve months time. Four incinerators, of a daily capacity of 750 tons each, were found by the Master, and admitted by defendant, to be necessary to accomplish the final disposal of the quantity of garbage and refuse which defendant dumps at sea daily during the summer months.

12. Petitioner avers that it will be impossible for the two incinerators now under construction to be put in

operation by June 1, 1933, and when put in operation will be inadequate to enable defendant to comply with the decree, and defendant has not submitted for the approval of the court, as required by its decision and decree, any other proposed means for the final disposal of all or any part of its garbage and refuse now dumped at sea, and petitioner believes that defendant has made, and intends to make, no provision for compliance with said decree on June 1, 1933, but intends to continue after that date, to dump its garbage and refuse at sea as heretofore, in violation of said decree, to the great damage and injury of plaintiff, its citizens, and its twenty-nine municipal subdivisions located along the shore of the Atlantic Ocean found by the Special Master to be injuriously affected by such dumping at sea.

13. At the time said decree becomes effective the present term of this court will have ended and the court will be in recess until the opening of the October term 1933, and during such recess plaintiff will be without adequate means of redress or relief in case the decree should not be complied with on and after June 1, 1933.

14. Petitioner therefore prays:

(a) That defendant be required to make answer to this petition and show cause at an early day why it should not be required to fully inform the court of the provisions it has made for full compliance on and after June 1, 1933, with the decree of this court.

(b) That defendant at the same time show cause why it should not be required to give satisfactory assurance of full compliance with said decree, in the form of a bond with sufficient sureties, or other binding and effectual obligation, to be approved by the court, for the benefit of plaintiff, its citizens and municipal subdivisions, to adequately and effectively indemnify them against, and save

Petition.

them harmless from, any loss, damage or expenses resulting from the neglect or failure of defendant to fully comply with said decree.

(c) That defendant show cause at the same time why it should not be adjudged in contempt of this court for its failure and neglect to make adequate provision for discontinuing the dumping of garbage and refuse at sea on and after June 1, 1933, as required by said decree, and also for its failure and neglect to provide four incinerators, each of a daily capacity of 750 tons, which are necessary for the otherwise final disposal of defendant's garbage and refuse now dumped at sea during the summer months.

(d) That plaintiff may have such further and other relief in the premises as the court may deem just and necessary to enforce the provisions of said decree and to protect plaintiff, its citizens and municipal subdivisions, from the results of any violation of said decree.

And your petitioner will ever pray, &c.

WILLIAM A. STEVENS,
Attorney-General.

DUANE E. MINARD,
Assistant Attorney-General.
Solicitors of Plaintiff-Petitioner.

May 8, 1933.

Petitioner's Brief in Support of the Foregoing Petition.

Argument.

The procedural facts upon which this petition is based are stated therein as they appear of record in this case and the decision and decree of the court.

References herein, unless otherwise stated, are to the Special Master's Report on Re-reference.

The decree entered by the court on December 7, 1931 (*284 U. S. 585*) was agreed to by the parties *Rep. p. 26.*

In December, 1929, the department of Sanitation (which has jurisdiction over the disposal of defendant's garbage and refuse) made a report containing a comprehensive program for the sanitary disposal of all of defendant's garbage and refuse and recommended the immediate construction of four incinerators, which were then regarded as necessary for immediate requirements. *Rep. pp. 3, 4.*

For the disposition by incinerators of the average daily dumpings at sea of 3,000 tons in the summer months the Master found that there should be immediately provided additional incinerator capacity to that extent, unless by increased consumption in existing incinerators, or by some other temporary expedient, the need of increased capacity was reduced. *Rep. p. 4.* Although the decree enjoined the defendant to operate and utilize the existing incinerators and other facilities for the final disposition of garbage and refuse in such a manner as to reduce to the lowest practicable limit the amount of garbage dumped at sea (*284 U. S. 585, 596*), the reports filed by defendant as of April 1, 1932, October 1, 1932 and April 1, 1933, show no diminution in the quantity dumped at sea. It is therefore presumed that additional incinerator capacity

of at least 3,000 tons per day, as found by the Master is still necessary to avoid dumping at sea.

The Special Master definitely found that four additional incinerators, each of a daily capacity of 750 tons, were necessary to dispose of the amount of garbage and refuse then dumped at sea in the summer months, and his recommendation to that effect was approved by the court in its decision rendered May 18, 1931.

The Master found that defendant had acquired in 1927, 1928 and 1929, three incinerator sites upon which defendant represented to the Special Master at the hearings on re-reference in July, 1931, that it proposed to erect three incinerators of 750 tons daily capacity each, and that the site for the fourth incinerator of like capacity in the Borough of Manhattan was then in the process of acquisition and that such fourth site would be available for use by the fall of 1931. *Rep. p. 5-6.* Defendant's report as of April 1, 1932 shows (p. 2) that the site for this fourth incinerator was acquired prior to October 1, 1931, and that a fifth site (for the Douglaston incinerator) was acquired December 31, 1931.

Plans and specifications for the proposed four incinerators were already nearly completed when the hearing on re-reference was held in July 1931, *Rep. pp. 13-14.* The report of April 1, 1932 shows that contracts, specifications and plans for four incinerators had theretofore been submitted to defendant's Board of Estimate and Apportionment for approval and authorization (*p. 2*).

Defendant's report of October 1, 1932 shows that the Board of Estimate and Apportionment took no action on those contracts, specifications and plans until June 17, 1932, when it approved only *three* of the four incinerators recommended the previous year. It shows that bids were not advertised until July 13, 1932 (p. 2). Bids were

opened August 10, 1932 and it was not until September 10, 1932, that the examination of the bids was completed (p. 2). The authorization of the contracts was not made until November 18, 1932, and then for only *two* incinerators of 750 tons daily capacity each (*Defts. Report of April 1, 1933*, pp. 1-2). Contracts for those two incinerators were awarded November 23, 1932, and executed a month later. Notwithstanding an open winter during which construction work was almost continuously carried on in New York City and vicinity, actual work on these two incinerators was not commenced until March 22, 1933 (*Ibid, p. 2*).

There has never been any question about the availability of funds for the four incinerators recommended by the Special Master. The Master found that appropriations had already been made and that all that was necessary to make the money immediately available was a resolution of the Board of Estimate and Apportionment allocating the funds to these particular projects (*Rep. p. 14*).

The testimony, upon which the Master based his conclusion that four additional incinerators necessary to enable defendant to discontinue entirely the dumping of garbage and refuse at sea could be constructed and put in operation on or before June 1, 1933, shows little difference of opinion between the eminent engineers produced by the respective sides. Plaintiff's engineers testified that 10, and defendant's engineers testified that 12, months would be necessary for the actual construction of a new incinerator ready for operation, and an additional six weeks would be required for testing; which, however, could be deferred until the fall or winter when there is a lesser demand for incinerator capacity than in summer (*Rep. pp. 10-11*). Both sides agreed that all four incinerators could be constructed simultaneously.

At this rate the two incinerators on which work was started March 22, 1933, cannot possibly be completed before January or February 1934. Meanwhile, if no other provision is made, and none has been submitted to the court for approval as required in the decision, 283 U. S. 479, 483, and by the decree 284 U. S. 548, 557, the dumping of garbage at sea will be continued during the summer season of 1933, when plaintiff's waters and beaches will be used daily by many thousands of persons, and the nuisance so long suffered, will continue as usual at least for another year.

The Special Master's report on the merits, filed March 20, 1931 (pp. 19-24), reviewed the history of defendant's dumping of garbage at sea and the disgusting nuisance that resulted in the accumulation of putrid masses of animal and vegetable matter in the waters and upon the beaches of plaintiff since 1918, in ever increasing quantities, which must be immediately removed at the expense of private owners or the municipalities to permit the use of the beaches, and to avoid foul and repellent smells, accumulation of flies and nauseating odors which sometimes reached the houses of the inhabitants (p. 50).

He also reviewed (pp. 19-23) the history of two decades of complaints and protests against this repulsive nuisance made on behalf of plaintiff by its successive chief executives, legislatures and municipalities, by various private and municipal organizations along the shore, and by various officers of the Federal government; also the numerous reports and recommendations of defendant's own officers and departments condemning the practice of dumping defendant's garbage at sea. Defendant took no notice of these complaints, protests and recommendations and took no action to stop the cause of the nuisance. On the contrary it continuously increased the dumping of its garbage

at sea and the resulting nuisance to plaintiff's waters and beaches.

After this review of injury and indifference, the Master concludes (p. 30) "that the delay of defendant in adopting a proper method of disposal has been unreasonably long."

With the necessary sites for four incinerators all in the possession of defendant prior to October 1, 1932, and with the necessary funds available before that time for actual construction, it was the solemn duty of defendant, in view of the decision of the court rendered in this case on May 18, 1931, to proceed immediately with the construction of incinerators without waiting for the decree of the court on re-reference. However, it did nothing between the filing of the Master's report in March, 1931, and the court's decree of December 7, of that year, and the progress reports filed by defendant as of April 1 and October 1, 1932, and April 1, 1933, show that no actual work was begun during the interval of 15½ months that elapsed between the entry of the decree and the beginning, on March 22, 1933, of actual construction work on two incinerators described at page 2 of the report filed as of April 1 (and presented to the court April 10), 1932.

Defendant has not shown that diligence which equity and justice, and the decree of this court, require. Knowing that it faces default under the decree it continues deliberately and in silence down almost to the very date of the dead line, without taking the measures obviously necessary for compliance with the court's decree. Defendant is in default not only because the two proposed incinerators will not be ready on time, but also because it has failed to do anything toward providing two more plants which the Master found (and defendant admitted) would be necessary to stop dumping at sea.

Supporting Brief.

On June 1, 1933, when the decree goes into effect, the present term of court will have ended, the court will have risen, and plaintiff will be helpless until the new term opens in October. Under these circumstances, plaintiff feels bound to bring the matter to the court's attention before adjournment in order that adequate protection may be afforded during the court's recess.

In this posture of affairs, plaintiff and the court are entitled to know before the court adjourns what measures defendant has taken to comply with the decree, and, in view of the apparent lack of adequate provision for compliance, to have some binding assurance against the evil results of a default.

Conclusion.

For these reasons plaintiff urges the prayer of the foregoing petition.

Respectfully submitted,

WILLIAM A. STEVENS,
Attorney-General.

DUANE E. MINARD,
Assistant Attorney-General,
Solicitors for Plaintiff-Petitioner.

May 8, 1933.

COPY

BEACH POLLUTION CASE.

Supreme Court of the United States

No. 3 Original—October Term 1933.

STATE OF NEW JERSEY,
Plaintiff,

vs.

CITY OF NEW YORK,
Defendant.

In Equity.
On Second Exceptions.

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION.

WILLIAM A. STEVENS,
Attorney General.

DUANE E. MINARD,
Counsel.

November 6, 1933.

Arthur W. Gross, Law Printer, 32-33 Lafayette Street, Newark, N. J.

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Supreme Court of the United States

No. 12 Original—October Term 1933.

STATE OF NEW JERSEY, *Plaintiff,* vs. CITY OF NEW YORK, *Defendant.*	*In Equity.* *On Second Re-reference.*

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION.

Statement of the Case.

This matter is now before the court on the return of an order to show cause, entered May 29, 1933 (*77 L. ed. 1011*), and on the report of Honorable Edward K. Campbell, Special Master, filed herein October 19, 1933, on the second re-reference.

This is an original action instituted by complaint filed May 13, 1929, praying for a writ of injunction to restrain defendant from dumping garbage and refuse, or other noxious, offensive or injurious matter, into the ocean off the coast of New Jersey, and from otherwise defiling or polluting the waters and beaches of plaintiff.

On October 14, 1929 the case was referred to Honorable Edward K. Campbell, Special Master, to take testimony, and to submit findings of fact, conclusions of law, and his recommendations for a decree.

His report, filed March 20, 1931, expressed his conclusion that plaintiff was entitled to relief in accordance with the prayer of the complaint.

The case was argued before the court on April 30, 1931, on defendant's exceptions to that report and, in an opin-

ion delivered by *Mr. Justice* Butler on May 18, 1931 (*282 U. S. 473*), the court approved the Special Master's conclusions and recommendations and directed a decree for injunction to be entered in accordance with the prayer of the complaint, after an allowance of a reasonable time to enable it to carry into effect its proposed plan for the erection and operation of incinerators to destroy the materials now dumped at sea, or to provide other means to be approved by the decree for the disposal of such materials. The case was referred back to the Special Master to ascertain what length of time would be reasonably necessary for that purpose, and to report his findings and a form of decree.

In his report filed November 30, 1931, he found that four additional incinerators, with a rated daily capacity of 750 tons each, were necessary, and that they should be ready for operation on or before June 1, 1933, and that until that date was a reasonable time to be allowed to enable defendant to otherwise finally dispose of its garbage and materials now dumped at sea.

A form of decree on that basis was consented to by the parties, and adopted and entered by the court on December 7, 1931 (*284 U. S. 585*), enjoining defendant, on and after June 1, 1933, in accordance with the prayer of the complaint, and directing defendant to file with the court, on the first days of April and October of each year, beginning April 1, 1932, a report setting forth the progress made in the construction of incinerator plants for the final disposition of garbage and refuse, and also the amount of garbage and refuse dumped at sea during the periods of the reports.

The decree also provided that either party may apply to the court, on due notice to the other party, with respect to the progress of construction of the proposed incinerator plants or other means of final disposition of garbage and

refuse, as may be deemed to be appropriate, and that either party may apply at the foot of the decree for any other or further action or relief. The court retained jurisdiction for the purpose of any order or direction, or any supplemental decree, which it may deem proper in relation to the subject matter in the controversy.

Defendant filed reports as of April 1 and October 1, 1932 and April 1, 1933. The last report, presented to the court on April 10, 1933, stated that on March 22, 1933, the work of actual construction of two incinerator plants, each of a daily capacity of 750 tons, was commenced.

The progress report of April 1, 1933, showed that it was impossible for the two incinerators to be completed in time to comply with the decree, and that the two additional incinerators, necessary to comply with the decree, had not been commenced, or even authorized, by defendant, and that the nuisance found by the court to exist was likely to continue indefinitely unless some action was taken to compel compliance with the decree. Plaintiff therefore, on May 8, 1933, on notice to defendant, applied under the decree, for further relief and prayed as follows:

(a) That defendant be required to make answer to this petition and show cause at an early day why it should not be required to fully inform the court of the provisions it has made for full compliance on and after June 1, 1933, with the decree of this court.

(b) That defendant at the same time show cause why it should not be required to give satisfactory assurance of full compliance with said decree, in the form of a bond with sufficient sureties, or other binding and effectual obligation, to be approved by the court, for the benefit of plaintiff, its citizens and municipal subdivisions, to adequately and effectively indemnify them against, and save them harmless from, any loss, damage or expenses result-

ing from the neglect or failure of defendant to fully comply with said decree.

(c) That defendant show cause at the same time why it should not be adjudged in contempt of this court for its failure and neglect to make adequate provision for discontinuing the dumping of garbage and refuse at sea on and after June 1, 1933, as required by said decree, and also for its failure and neglect to provide four incinerators, each of a daily capacity of 750 tons, which are necessary for the otherwise final disposal of defendant's garbage and refuse now dumped at sea during the summer months.

(d) That plaintiff may have such further and other relief in the premises as the court may deem just and necessary to enforce the provisions of said decree and to protect plaintiff, its citizens and municipal subdivisions, from the results of any violation of said decree.

Defendant appeared and filed an answer, and also a petition alleging inadequacy of funds to provide four incinerators, and praying for an extension of time to April 1, 1934, for the completion of the two incinerators then under construction, and for a modification of the court's decree to that extent. The court, on May 29, 1933, referred the matter back to the Special Master to ascertain and report:

(1) What shall have been done by defendant up to September 15, 1933, and the time reasonably required to enable it to comply with the decree;

(2) The amounts that shall have been expended, subsequent to June 1, 1933, by plaintiff and its political subdivisions to prevent or lessen the defilement or pollution of the waters, shores and beaches within that state and the damages respectively sustained by them as a result of defendant's failure to comply with the decree.

and directed that the court would hear the parties on November 6, 1933, without exceptions to the Master's report.

The Master's report under that order, filed October 19, 1933, recites the proofs adduced at the hearings, but makes no recommendations.

The matter is now before the court for action on the cross petitions of the parties respecting defendant's failure to comply with the decree.

ARGUMENT.

The Special Master has made three reports in this case; the first, filed March 20, 1931, on the main case, the second, filed November 23, 1931, on the first re-reference, and the third, filed October 19, 1933, on the second re-reference. These reports are herein referred to as "1st Rep.," "2nd Rep.," and "3d Rep.," respectively. Unless otherwise indicated, re-references herein relate to the Master's report, and the stenographer's transcript of the testimony and the exhibits (herein referred to as "S. M.") on this second re-reference.

(1)

Four incinerators are necessary to comply with the decree.

In December, 1929, the department of Sanitation (which has jurisdiction over the disposal of defendant's garbage and refuse) made a report to the Board of Estimate and Apportionment (defendant's governing body) containing a comprehensive program for the sanitary disposal of all of defendant's garbage and refuse, in which it recommended the immediate construction of four incinerators, as necessary for immediate requirements (*2d Rep. pp. 3, 4*).

On the first re-reference the Master found that there should be immediately provided additional incinerator capacity to the extent of 3,000 tons daily, unless, by increased consumption in existing incinerators, or by some other expedient, the need of increased capacity was reduced (*2d Rep. p. 4*). Although the decree enjoined the defendant to operate and utilize the existing incinerators and other facilities for the final disposition of garbage and refuse in such a manner as to reduce to the lowest practicable limit the amount of garbage dumped at sea (*284 U. S. 585, [illegible]*), the reports filed by defendant as of April 1, 1932, October 1, 1932, and April 1, 1933, and the testimony on this record (*S. M. 600-1*), show no substantial diminution in the quantity dumped at sea.

On September 22, 1931, the Chairman of the Sanitary Commission submitted to the Board of Estimate and Apportionment, for approval of terms and conditions, a form of contract, and plans and specifications, for four incinerators (*Deft.'s Ex. 2; Rep. p. 2*).

The record on this re-reference shows that in the proceedings of the Board of Estimate and Apportionment, from September 22, 1931 to June 17, 1932, the four incinerators recommended by the Sanitary Commission were under consideration, but on June 17, 1932, without any explanation or assigned reason, one of them was dropped and never further considered (*Deft.'s Ex. 2, 5, 11, 12, 14, 17, 21-25, 33-36, 39-41, 44, 46; Rep. pp. 2-6*). Bids were advertised and received for only three incinerators (*Deft.'s Ex. 46, 48, 58, 59, 60; Rep. pp. 6-9*). Thereafter, on October 6, 1932, one of the three incinerators (Douglaston) was referred back to the Department of Sanitation for further consideration and report, and there it still remains. Contracts for only two were let (*Rep. pp. 7-8*).

On October 24, 1932, the Assistant Engineer of the Board of Estimate and Apportionment, in response to a

request of that Board, reported on the entire question of incineration. In his conclusions, he stated:

> "there does not appear to be any good reason for considering at this time the abandonment of construction by the city of the *three* new incinerators."

He also reported that the fourth incinerator should be built (*Deft.'s Ex. 66, p. 19*).

Sites for four incinerators had all been acquired prior to December 31, 1931 (*Deft.'s Progress Report April 1, 1932, p. 2: Deft.'s Ex. 5*).

Mr. Goodrich, the present Sanitary Commissioner, testified on October 2nd to the following record of scows dumped at sea, between June 1st and September 15th, 1933; June, 116; July, 100; August, 85; September 1 to 15, 36; total 337; averaging 1,500 cubic yards per scow, and about three cubic yards to the ton of garbage (*S. M. 600-1*). That represents a total of 505,500 yards or 168,500 tons. Excluding Sundays, but including holidays, and excluding the 28 days during that period, when Mr. Goodrich testified no garbage was dumped at sea, this quantity represents an average of 2,635 tons per day.

He testified that the two incinerators now under construction would not take care of all the garbage and refuse now dumped at sea (*S. M. 204*). To discontinue, entirely, sea dumping it will be necessary to dispose of the remainder in land fills, or to build two additional incinerators (*S. M. 205-6, 215-6; Rep. p. 21*).

It therefore appears that four incinerators, each of 750 tons daily capacity, are as necessary now as they were in 1929, and that they are absolutely necessary for compliance with the decree of the court.

(2)

Defendant has failed to take the necessary steps to comply with the decree.

The testimony of the present Sanitary Commissioner, quoted by the Master at pages 18 and 19 of his report, show conclusively that no attempt has been made to comply with the decree by discontinuing dumping at sea. The two incinerators now under construction are admittedly insufficient. Absolutely no plan or program for providing the necessary remaining incinerator capacity has been adopted or seriously considered by defendant, from the time two of the four incinerators recommended to the Board of Estimate and Apportionment by the Sanitary Commission in December, 1929 (*2d Rep. pp. 3-4*), and again on September 22, 1931 (*Deft.'s Ex. 2; Rep. p. 2*) were dropped from consideration (one on June 17, 1932, and the other on October 6, 1932) and have so remained until the present time (*S. M. 590-2*). All four incinerators are essential to defendant's compliance with the decree of this court.

The record of progress on the two incinerators under construction is one of neglect, indifference, incompetence, and contemptuous disregard of a serious obligation.

The Sanitary Commission recommended the immediate construction of four 750-ton incinerators in December, 1929, as immediately necessary. It repeated that recommendation on September 22, 1931. No action was taken by the Board of Estimate and Apportionment on those recommendations before the date of the court's decree of December 7, 1931.

Even that decree inspired no action.

On December 10, 1931, the Committee of the Whole of the Board, by a resolution recommended to the Board the adoption of the forms of contract, plans and specifications

submitted by the Sanitary Commission on September 22 of that year (*Deft.'s Ex. 23*). From that date until August 10, 1932, the time was consumed in working up to the receipt of bids on three incinerators, on which contracts were let for two on November 22, 1932 (*Deft.'s Ex. 71*). The contract provided for completion in 200 working days, but work was not commenced until March 24, 1933. The tedious progress of that "red tape" is disclosed in Defendant's Exhibits 1-82, and is reviewed by the Master at pages 2-11, of his report.

During that time, the Board was repeatedly reminded of the court's decree, and the danger of an adjudication of contempt. Members of the Sanitary Commission (which had the responsibility for disposing of the garbage and refuse and for building incinerators to stop dumping at sea), and others, were conscious of undue delay, and frequently prodded the Board for action (*Deft.'s Ex. 25, 43, 44*).

When the matter of these incinerators again came before the Committee of the Whole of that Board, on November 1, 1932 (nearly a year after that Committee had recommended action, *Deft.'s Ex. 23*) the comptroller of defendant (Mr. Berry) called attention to the decree of this court and to the danger of the Board being held in contempt for non-compliance. He charged the Acting Mayor (Mr. McKee) with being responsible for the delay of nearly a year in the building of incinerators. The Acting Mayor cheerfully accepted that responsibility (*Deft.'s Ex. 67, pp. 42-3*).

On November 18, 1932, that Board approved the award of contracts for two incinerators, (*Deft.'s Ex. 69*), and the contracts were awarded five days later (*Deft.'s Ex. 71*). Those contracts did not include plumbing and heating, which were necessary elements in the completion of the incinerators. Contracts for plumbing and heating were

submitted to the Mayor by the Chairman of the Sanitary Commission on April 12, 1933, in a communication in which he urged immediate action because of the injunction decree of this court. He also pointed out that the delay in letting the plumbing and heating contracts was delaying the contractor, who claimed damages against the city, and had asked for an extension of time to complete the work, on account of that delay (*Deft.'s Ex. 73, 76*).

Although the contracts for plumbing and heating were approved on May 19, 1933 by the Board of Estimate and Apportionment (*Deft.'s Ex. 77*), and by the Corporation Counsel on May 25, 1933 (*Deft.'s Ex. 76*), they have not yet been let (*Rep. p. 111; S. M. 598*). The contractor testified that the installation of plumbing and heating pipes was necessary to the progress of the work above the foundation level and that because of the failure to let the plumbing and heating contracts the work on one of the incinerators had been at a standstill since July 28, 1933, and the work on the other would be at a standstill within ten days of the date of his testimony (October 2, 1933) because he could not pour concrete above the foundation level until the pipes were in place (*S. M. 610-12*).

Other causes of delay exist. Unsettled disputes between defendant and its contractors are pending over various facilities and equipments to be built into the incinerators, including cranes, blowers, hoppers, doors, sidewalks, ramps, light and power and furnaces (*S. M. 645-9*). No apparent effort is being made to adjust these difficulties or to exercise defendant's power under the terms of the contracts to enforce the time limit for construction.

Although the construction work was actually begun on March 22, 1933, under contracts which provided for completion within 200 working days, the contracts stood, on October 2, 1933; one 34% completed and the other about

20% completed (*Rep. p. 10; S. M. 610*). The Sanitary Commissioner expressed the opinion that they would not be completed before June 30, 1934 (*S. M. 591*).

Defendant and the contractor blame each other for delays, but the outstanding fact is that the plumbing and heating contracts have not yet been let and no work above the foundation level can be done until those contracts are let, since heating and plumbing pipes must be placed in position before the concrete for the super-structures can be poured.

On the first re-reference considerable testimony was taken as to the required amount of time to prepare plans, acquire and clear sites, advertise for bids, let contracts, accomplish the necessary municipal legislation preliminary to the work of constructing incinerators, and the necessary amount of time for actual construction and testing.

By consent of the parties the Master took the outside limit proposed by the defendant, namely, June 1, 1933, and that date was embodied in the consent decree entered by the court on December 7, 1931 (*284 U. S. 585*). Defendant has never claimed that the time was insufficient for the construction of four incinerators of 750 tons daily capacity each.

No claim is made that lack of funds delayed the two incinerators now under construction. The decree, consented to by defendant, allowed 20 months to complete the incinerators. On the first re-reference defendant admitted that four incinerators could be constructed, simultaneously, in the same period required for one. The contractors of the two under construction agreed to complete them within 200 working days, which is less than two-thirds of the number of working days in a calendar year.

It therefore appears that delay in those two was due to a whole year's delay (after the decree) in awarding

contracts and another four months' delay in commencing work, during a winter (1932-3) which was notoriously mild and open, and suitable for construction work.

The necessity for an extension of time on those two incinerators was due to a deliberate and stubborn disregard of the decree, and disregarded by the Board of Estimate and Apportionment to oft repeated warnings and pleas for expedition made by the Sanitary Commission. This conduct does not deserve the indulgence of the court, while plaintiff suffers from the delay. He who seeks equity must do equity, and also come into court with clean hands.

(3)

Defendant has not shown any valid financial reason for not complying with the decree.

During the hearings on the first re-reference, Mr. Smith, a member of the Sanitary Commission of defendant, testified that sufficient money for all four incinerators had been appropriated by defendant and would be immediately available upon the passage of a resolution by the Board of Estimate and Apportionment transferring its use to the four particular incinerators then under consideration (*S. M. 289, 319, 686, 1st Re-Ref.*).

He testified (in July, 1931) that in order to make the money available only a resolution of the Board of Estimate and Apportionment was necessary, and that, on May 28, 1931, the Chairman of the Sanitary Commission had requested that the funds previously appropriated for various incinerators should, by resolution, be made applicable to the four then in contemplation (*S. M. 289, 290, Deft.'s Ex. 5, 1st Re-Ref.*). He also testified that the Board had asked his commission to defer the re-allocation of this money until the plans and specifications had been

completed (*S. M. 319, 1st Re-ref.*). At the hearing of July 24, 1931, which was the last hearing on the first re-reference, the Special Master recalled Mr. Smith, and expressly inquired of him whether the money for these incinerators was available, and if not what condition it was in. Mr. Smith testified "It is available after being allocated by the Board of Estimate and Apportionment to this specific project." He stated that the money had been originally provided for a larger number of smaller incinerators in various localities and that because of the decision to build a fewer number of larger incinerators, the small amounts previously allocated to the smaller incinerators would have to be added together and re-allocated to these specific larger projects (*S. M. 687-8, 1st Re-ref.*).

In the Master's report on the first re-reference he stated, at page 14—

> "The facts show that appropriations have already been provided for incinerators in various localities. These were provided for smaller plants than are now deemed efficient, and larger plants are proposed to take their places. Therefore it is necessary to take a number of small amounts and add them together to make the larger sum necessary for the present program. Application must accordingly be made to the Board of Estimate and Apportionment to allocate said sums to this particular project. This Board acting favorably, *the money is available*, and there is no suggestion that the Board will act unfavorably." (*Italics ours.*)

Plans and specifications, and forms of contract, for four incinerators were submitted on September 22, 1931, by the Chairman of the Sanitary Commission for action by the Board of Estimate and Apportionment, with a request for "sub-authorizations of *existing corporate stock funds*" for their erection.

From the above language it is clear that the Chairman of the Sanitary Commission, on September 22, 1931, had the same understanding about the availability of "existing" funds as his fellow member, Mr. Smith, had when he testified on the second re-reference on July 24 of the same year.

For the completion of the incinerators within a given time two elements were essential; first, the availability of funds to do the work, and second, the time within which to do the work. Because the defendant's officers admitted that the funds were available, the hearings on first re-reference were devoted entirely to the question of time for preliminaries and construction. The availability of funds was never at any time questioned by defendant during the hearings on re-reference, and the Master's report on the first re-reference and the consent decree were based upon the definite assurance by defendant of the availability of funds.

Defendant filed progress reports under the decree, on April 1 and October 1, 1932, and April 1, 1933, respectively. Those reports relate the progress on letting contracts and construction work, but none of them contains a word about lack of funds. That question was not raised until defendant was called upon, on May 8, 1933, for an explanation of its delay. Then, for the first time, it claimed lack of funds and prayed for an extension of time to complete the two incinerators which had been begun. It remained silent on this question until within less than a month before the effective date of the decree. At the last moment when confronted with contempt proceedings, it sought refuge behind the shelter of "depression" and presented a poverty plea. Equity and good conscience required that it bring this matter (if it existed) to the attention of the court at an early date. According to the testimony submitted on this re-reference, if it is true, it

knew of this condition when it filed its first report on April 1, 1932. In fact, on that basis, it knew it (if true) when it consented to the decree of December 7, 1931, but it remained silent through the entire period of one and one-half years given it to complete the incinerators, during which the court and the plaintiff assumed, and had the right to assume, that the only question involved was the physical construction of the incinerators, and that the decree would be complied with.

The Special Master refers in his report on this re-reference (*p. 22*) to the testimony in 1931 on the first re-reference that the funds for building the four incinerators were available. He says—

> "Under the testimony adduced at this hearing the above statement is in error and the sale of authorized corporate stock notes or bonds is necessary."

It is respectfully submitted that the truth of the testimony given at the first re-reference about the availability of the money has never been denied. On the hearings on this re-reference no witness has testified that the money was not then available. Such denial does not appear anywhere in this record.

Is the court to believe the word of the Chairman of the Sanitary Commission, and the word of a member of that commission given under oath in 1931, that the money was then available, or the statement of counsel, or some subordinate *off the record* in 1933, made for the purpose of excusing defendant's contempt of a decree of this court?

If the court cannot take the official statement of the Chairman and the sworn testimony of a member of the Sanitary Commission, and rely upon them in good faith, as the Master and the court both did on the first re-ref-

erence, how can defendant, standing at the eleventh hour before a court of equity charged with contempt of its decree, be heard to state the contrary for the sole purpose of purging its contempt, and where no extenuating circumstances have been shown or timely pleaded to excuse a flagrant disregard of the court's order?

At no time during the proceeding before the Board of Estimate and Apportionment relating to this subject, as those proceedings are shown in Defendant's Exhibits 1 to 62, on this re-reference, and recited in the Master's report, was it suggested that the lack of money was the cause of delay, or of abandoning two of the four incinerators. On the contrary, on October 24, 1932, the Assistant Engineer of the Board of Estimate stated that four incinerators should be built (*Deft.'s Ex. 66, p. 19*), and when the subject was discussed in November, 1932, before the Committee of the Whole of that Board, when Acting Mayor McKee was accused of responsibility for the delay, and assumed that responsibility, the question of financial inability was not suggested or discussed (*Deft.'s Ex. 67, pp. 42-3*).

Various difficulties, imposed by its own laws and procedure, have been interposed by defendant as grounds for delay or its inability to provide funds. These need not be discussed, since they present no valid reasons for failure to comply with a decree of this court.

Statutory and other difficulties in the way of raising funds to carry out the court's orders were interposed by the defendant in *Wisconsin* v. *Illinois*, 281 U. S. 179, respecting which the court said:

(p. 197)

> "It already has been decided that the defendants are doing a wrong to the complainants, and that they must stop it. They must find out a way at their peril. We have only to consider what is pos-

sible if the state of Illinois devotes all its powers to dealing with an exigency to the magnitude of which it seems not yet to have fully awaked. It can base no defenses upon difficulties that it has itself created. If its Constitution stands in the way of prompt action, it must amend it or yield to an authority that is paramount to the state."

In spite of testimony offered by defendant to show that funds for incinerator construction can be obtained only by the sale of corporate stock notes and that none can now be sold, important facts clearly appear from the record on this re-reference which destroy defendant's claim of lack of available funds to comply with this decree.

Mr. Duncan MacInnis, Chief Accountant of the Department of Finances of defendant, testified concerning financial conditions of the city since the beginning of 1931 (*S. M. 218-19*). He testified that in 1932 the city registered $8,900,000 of new contracts, including $1,410,000 for the two incinerators in question (*S. M. 221*). Out of the $200,000,000 of corporate stock notes authorized by the legislature in March 1931, (*S. M. 230*) the city still had at the time the witness testified (*July 17, 1933*), a margin of $5,915,000 for issuance (*S. M. 222*); that city expenditures for subway work were: 1931, $70,000,000; 1932, $80,000,000; 1933, $6,000,000 (*S. M. 232-3*).

The city is spending 12 million dollars for school, docks and hospital construction in 1933 (*S. M. 233*). It is authorized by law to construct local improvements costing in excess of $50,000 and assess the cost direct upon the property in the city (*S. M. 235*). *It has issued corporate stock notes in 1933 to the amount of $5,000,000 for subway work. $80,000,000 of such notes were also issued in 1932, and $70,000,000 in 1931 for the same purpose* (*S. M. 236*).

If defendant could sell notes for subways in 1932 and 1933 in the aggregate of 85 million dollars, why could it not have sold another two million dollars, or used some of the proceeds of those notes, to enable it to comply with the court's decree?

Defendant has offered to a syndicate of bankers an issue of corporate stock notes to renew existing notes and for an additional sum of $5,000,000, aggregating $28,000,000, but it refused to take the issue (*S. M. 241*). No attempt has been made to sell notes to, or to borrow money from, any other banks or syndicates (*S. M. 246*).

As to the source of the funds for the two incinerators under construction, there is a conflict in the testimony. Mr. MacInnis testified that those funds came from the sale of corporate stock notes in June, 1933, (*S. M. 237-9*). There is no explanation why enough money for two more incinerators could not have been obtained by the same method at the same time. There is no proof of an attempt to do so.

Mr. Goodrich testified (*S. M. 622*) that money for the two incinerators under construction came, as far as he knew, from an appropriation from the Board of Estimate and Apportionment. This money was "set aside from the funds." Why enough money for two more incinerators was not provided in the same way does not appear. MacInnis stated definitely that no offer of notes for incinerator construction had been made (*S. M. 240*).

Mr. MacInnis testified to the city's budgets (in round figures) as follows:

1930	$570,000,000	(*S. M. 223*)
1931	620,000,000	
1932	631,000,000	
1933	519,000,000	(*S. M. 224*)

The city ratables were, 1930 $18,233,000,000, 1931 $18,800,000,000, 1932 $19,600,000,000, 1933 $16,000,000,000 (*S. M. 231*).

Defendant's comptroller published, on October 21, 1933, a statement of the proposed budget for 1934, as follows (*N. Y. Times, Oct. 22, 1933, p. 8*):

> "The total city budget for the year 1933 amounted to $518,427,972.16—representing a decrease under the budget for the year preceding of approximately $113,000,000.
>
> "In preparing the proposed budget for 1934, submitted today, the Board of Estimate found it necessary to include certain increases, mandatory or constructively mandatory, over the figures of 1933, amounting to $28,075,883. These represent the added needs of the city's debt service, annual increases in pensions and in certain salaries necessary under existing legislation, and increases due to emergency demands upon the city's charitable and relief resources other than those made from the emergency relief funds.
>
> "These increases are as follows:

For the city debt service	$13,956,000
For pension funds	5,494,883
For salary increments	2,808,000
Charges for increase in the number of city dependents cared for by private charitable institutions; for increase in the number of patients cared for by city hospitals; and for veterans relief	462,000
Net increases in appropriations for the Board of Education, due to the reduced allowance for educational aid from the State	2,243,000
Added positions in various new courts, required by legislative act	92,000
Cost of additional election districts	20,000

> "These requirements, added to the 1933 budget figures, brought the real total from which reductions could be made to $546,498,855."

Fabulous amounts of money can be found for voluntary purposes, but nothing can be found to enable defendant to comply with a decree of this court. It chooses to build two, instead of four, incinerators, and finds the money without difficulty, but for the other two, it says no money is available. It has "wool for my master and wool for my dame," but none for compliance with the decree of the highest court in the land.

Plaintiff has sought relief for 20 years from the abominable nuisance of defendant's garbage and refuse in its waters and on its shores. It proved its case in this court and obtained a decree according to the prayer of its complaint. Yet it has no benefit of the decree. The public welfare requires that the decrees of this court shall be respected and observed. If defendant can disregard them with impunity their virtue and force is destroyed, and there is no redress against the colossal public nuisance which it constantly imposes upon its neighbor.

Reference is made by the Master to Mr. McAneny's testimony respecting an application for funds to the Reconstruction Finance Corporation (*pp. 13-14*). That corporation has been in existence for several years, but defendant's sense of duty has never prompted it to apply thither for funds to enable it to comply with the court's decree. Up to October 2, of this year, no such application had been made. Mr. McAneny's testimony on this point, as in general, was extremely vague (*S. M. 584*). He said no application had been made. All he would say, respecting when the application would be made, was "I imagine within the next two or three weeks. It is coupled with the broad subject of our needs for sewage disposal as well" (*S. M. 586*). If we wait for incinerators until defendant builds sewers, none of us may live to see compliance with the decree. None of the city officials take that decree seriously. It imposes upon them no obligations of conscience or mind.

The record discloses a lack of sincere effort to comply with the decree. It shows no valid, or conscientious reason why funds were not available, or could not have been procured, if defendant had sincerely tried to find a way to comply with the decree.

(4)

Reimbursement of expenses due to defendant's failure to comply with the decree should be ordered.

The Master's report (*p. 19*) shows the proven expenditure made by the political subdivisions of plaintiff for the removal of gargage and refuse during the summer of 1933, due to the failure of defendant to comply with this court's decree.

Unfortunately many of the municipalities failed to keep their accounts in a manner that would show such expense separately from other municipal work. Considerable sections of the beach front was cleaned by private persons or associations, whose expense for that purpose was excluded as not within the purview of the order (*S. M. 377*).

Plaintiff is entitled to reimbursement on behalf of its political subdivisions for the money thus expended, and to protection by bond or other security to indemnify against future expenditures of a like nature.

(5)

CONCLUSION.

In conclusion plaintiff submits that this record shows:

1. That four incinerators, of 750 tons daily capacity each, are necessary to enable defendant to comply with the court's decree; that the two under construction could have been provided within the time required in the decree, except for unnecessary delay on the part of defendant;

and that no attempt whatever has been made by defendant to provide the two remaining incinerators necessary for compliance.

2. That defendant had the money at the time for compliance with the decree but failed to so apply it: that if it had not the money when the decree was made, it has not made such effort to obtain it as will excuse its failure to comply.

3. That the nuisance enjoined continues without abatement, and that it never will be abated except under the drastic compulsion of this court.

4. That the conduct of defendant shows a lack of the diligence and good faith which equity and good conscience require in the fulfillment of the court's decree, and which lack amounts to contempt of this court.

5. That defendant should be adjudged in contempt of this court, and be punished accordingly, and that the court should adopt such salutary measures as may be necessary to enforce compliance with its decree at the earliest practicable date.

Respectfully submitted,

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Solicitor of Plaintiff.

DUANE E. MINARD,
Of Counsel.

November 6, 1933.